

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOSE DUTRA, a minor, by and through his  
Guardian, COMMENCEMENT BAY  
GUARDIANSHIP SERVICES; and MISTY  
M. DUTRA, individually and as natural  
mother of JOSE DUTRA, a minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. C04-5025 RBL

ORDER

On October 6, 2005, following a trial to the bench, this Court entered findings of fact and conclusions of law holding the United States liable for injuries caused to Jose Dutra by the medical negligence of a physician insured by the government. The total economic loss awarded to Jose Dutra was \$4,428,589. Of that amount, \$3,681,766, was awarded for future medical goods and services required for Jose Dutra according to a Life Care Plan submitted to the Court on his behalf. Before and during trial the government requested that the Court consider placing the future medical expenses award into a reversionary medical trust. The government cited RCW 4.56.260 and case law from Colorado and the Tenth Circuit as legal authority supporting the Court's discretion to take such action. The Court rejected

1 the proposed reversionary medical trust which would have resulted in a return to the government of  
2 residual funds within the trust upon the death of Jose Dutra.<sup>1</sup>

3 The government appealed the Court's decision regarding a reversionary trust and, in the process,  
4 modified its explanation of what this Court was asked to do at trial. The government convinced the Circuit  
5 panel that before and during trial, it had requested that the Court solicit formal written proposals from the  
6 parties, as required by RCW 4.56.260, regardless of whether the Court was inclined or disinclined to order  
7 that future medical expenses be placed in a medical reversionary trust.<sup>2</sup>

8 On remand, this Court has been directed to implement the provisions of RCW 4.56.260. On  
9 October 4, 2006, the Court requested written proposals for periodic payment of future medical expenses.  
10 On October 13, 2006 the Court received proposals from the parties. As promised, the government has  
11 submitted two proposals, both of which involve a reversionary medical trust. If accepted, each proposal  
12 would require that the residue of the trust revert back to the government upon Jose Dutra's death. For the  
13 reasons expressed in the hearing of October 4, 2006, this Court rejects such proposals. These reasons are  
14 summarized as follows:

- 15 1) The government's proposal would result in a trustee with divided loyalties between  
16 Jose Dutra's on-going medical needs and the government's interest in recouping  
17 residual funds made available by a premature death of Jose Dutra. While remainder  
18 trusts are not uncommon, here, the express purpose of the trust is to save money for  
19 the grantor/tortfeasor at the expense of the beneficiary/victim.  
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22 <sup>1</sup>In the medical reversionary trust described by the government, the United States would be grantor and Jose Dutra would  
23 be beneficiary. The trust would be administered by a trustee selected by the government. Upon the death of Jose Dutra, the  
24 administrator would return the residue to the government. The apparent conflict of an administrator doing what is best for the  
beneficiary while, at the same time, preserving trust assets for the government which would recover in the event of premature  
death of the beneficiary has never been dealt with to this Court's satisfaction.

25 <sup>2</sup>The Court finds it noteworthy that following the Court's decision on the issue, the government did not request  
26 clarification or reconsideration or otherwise articulate its belief that the Court misunderstood the true nature and scope of its  
27 request. Indeed, at a status conference on October 4, 2006, the government's trial lawyer confirmed what all others in the  
28 Courtroom understood from the beginning: the government wanted a medical reversionary trust and RCW 4.56.260 was cited  
only as the vehicle by which it sought to persuade the Court to adopt one. It did not ask for the statute to be implemented as a  
stand-alone proposition. For reasons that will become clear in this opinion, the government's trial lawyer, unlike those who  
managed the appeal, understood that if the Court was not going to order a reversionary medical trust, there was no benefit to  
anyone to go through the time and expense of submitting formal periodic payment proposals.

- 1           2)     The government's proposal represents a significant change in Washington tort law.  
2                 Unlike Colorado's law (which the U.S. cites as persuasive authority), Washington  
3                 law does not provide for the termination of future medical payments by a tortfeasor  
4                 upon the death of the plaintiff. In Washington, future medical damages are  
5                 predicted by the trier of fact using life expectancy tables, opinions about future  
6                 needs and economic assumptions to reduce future costs to present value. The  
7                 resulting conclusion results in an award or verdict which precedes any consideration  
8                 of periodic payments. RCW 4.56.260(1). Once the finder of fact determines the  
9                 amount of future damages, the trial court has no authority to reduce the award by  
10                accepting a proposal that costs the tortfeasor less than the exact amount of the  
11                award or verdict. The size of the award does not change in the future depending on  
12                whether the plaintiff lives a shorter or longer life than anticipated at the time of trial.
- 13           3)     A medical reversionary trust is not in the best interest of the plaintiff who is the  
14                 victim of the defendant's negligence. See RCW 4.56.260(2); *Hull v. United States*,  
15                 971 F.2d 1499, 1505 (10<sup>th</sup> Cir. 1992). In meeting the on-going needs of Jose Dutra,  
16                 those responsible for his care need maximum flexibility over the assets made  
17                 available to him as a result of the Court's award. A medical reversionary trust that  
18                 delays payment to the plaintiff is not helpful.

19           As stated by the Court during the October 4, 2006 hearing, the proposal which, "in the discretion  
20 of the Court and the interests of justice best provides for the future needs of the claimant," (RCW  
21 4.56.260(2)), is that proposal which puts the most money in the special needs trust in the shortest time.  
22 Plaintiff's proposal number 1 is consistent with the Court's earlier observation. Jose Dutra needs  
23 immediate, comprehensive therapy for the effects of the brain damage he has suffered. That care was  
24 deferred by a mother ill-equipped to deal with a child with Jose Dutra's needs. The care was then delayed  
25 by the time devoted to an appeal which this Court views as misguided. Now, the trust should be front-end  
26 loaded to the maximum amount possible to guarantee that Jose gets the treatment he needs immediately.  
27 The Court selects proposal Number 1 submitted by plaintiff.

28           The United States objects to the plaintiff's Special Needs Trust because it will allow Jose's medical

1 expenses to be paid by Medicaid while preserving the funds in the special needs trust intended by the Court  
2 to pay for Jose Dutra's medical expenses. The government points out that upon Jose's death, the State of  
3 Washington and not the federal government, would have the primary right to be reimbursed for medical  
4 care paid for through Medicaid. (See U.S. Submission of Periodic Payment Proposal 4:13-18, Dkt. #93-  
5 1). The United States forgets its status in this case. The United States is the tortfeasor legally responsible  
6 for profound brain damage to a youngster. As a tortfeasor, it is obligated to compensate the plaintiff for  
7 the damages it has caused. As a government, it chooses to provide services to certain citizens in need. It  
8 enacted legislation that allows disabled citizens under 65 to obtain medicaid payments even if they have  
9 trust assets which would otherwise disqualify them from such benefits. Upon the death of the trust  
10 beneficiary, the trust must reimburse Medicaid from remaining trust assets. Put simply, the law allows, but  
11 does not compel, disabled trust beneficiaries to use Medicaid services when necessary or appropriate.

12       Anywhere from 50% to 83% of the cost of a state's Medicaid programs is paid by the federal  
13 government. Nevertheless, the right to reimbursement for medicaid benefits provided a disabled citizen  
14 with a special needs trust is exercised by the state, not the federal government. *See* 42 U.S.C. § 1396  
15 p(d)(4)(A). The law does not compel a different outcome where, as here, the tortfeasor responsible for  
16 funding the special needs trust is also the federal government. The Court sees no need to treat the United  
17 States differently than any other tortfeasor under Washington law.

18       Next, the United States argues that if the Court accepts the Special Needs Trust as the vehicle to  
19 pay Jose's future medical expenses, a special provision should be added to the trust requiring the  
20 notification of the federal government when Jose dies. The government wants to decide if they should  
21 petition the Court to seek a return of trust corpus to the government. RCW 4.56.260(5) provides that  
22 upon the death of a judgment creditor a "party in interest" may petition the Court to modify the judgment  
23 to award and apportion the unpaid future damages. In this case, for reasons stated below, the government  
24 will likely satisfy the judgment with a lump sum payment into the special needs trust established for Jose  
25 Dutra. Upon payment by the defendant, neither the trust nor Jose Dutra will be a judgment creditor.  
26 Moreover, the government will not be a party in interest as that term is used in the statute. Rather, the  
27 government will be a tortfeasor which has satisfied the judgment against it well before the death of the  
28 plaintiff. It will have no future interest in the corpus of the trust. In the event that the defendant opts to

1 perform under proposal 1 submitted by the plaintiff, the periodic payments will end in the sixth month  
2 following judgment. In any event, this Court will not require the notification to the government of Jose  
3 Dutra's death.

4 Finally, the United States argues that this Court cannot require the United States to pay future  
5 periodic payments or to purchase annuities. U.S. Memo 6:16-22, Dkt. #93-1. With this argument we  
6 come full circle. If the Court does not grant the U.S. a reversionary medical trust, then it cannot compel  
7 future periodic payments or the purchase of annuities as mandated by the same statute the government says  
8 it wants the Court to implement.

9 According to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) a district court may only award  
10 lump sum money judgments against the government. *See Hull v. United States*, 971 F.2d 1499, 1504-05  
11 (10<sup>th</sup> Cir. 1992), cert. denied, 507 U.S. 1030 (1993); *Reilly v. United States*, 863 F.2d 149, 169 & n.16 (1<sup>st</sup>  
12 Cir. 1988); *Francel v. Heym*, 466 F.2d 1226, 1228-29 (3<sup>rd</sup> Cir. 1971). The United States also argues that  
13 District Courts lack jurisdiction to order the United States to pay future periodic payments, or to purchase  
14 annuities. *See Hill v. United States*, 81 F.3d 118, 120 (10<sup>th</sup> Cir. 1996).

15 Once again, the United States seems to argue that if the Court rejects a reversionary medical trust  
16 then the United States prefers to pay the judgment the old fashioned way, one lump sum payment either to  
17 the plaintiffs or into the Registry of the Court. This is exactly the position taken by the United States at  
18 trial.

19 Neither the Washington statute nor the opinion of the 9<sup>th</sup> Circuit compels the Court to adopt a  
20 reversionary medical trust favoring the defendant in this case. The Court has rejected such a proposal on  
21 multiple occasions. The Court has now accepted plaintiff's proposal 1 as that proposal which best serves  
22 the needs of the plaintiff and the interests of justice. Defendant has until the end of business on October  
23 31, 2006 to inform the Court that it withdraws the request for periodic payments. Depending on the  
24 decision of the defendant, judgment will be entered by the Court either requiring the U.S. to pay a lump  
25 sum into the special needs trust as originally ordered in 2005, or to purchase an annuity contract which  
26 fulfills the precise terms of plaintiff's proposal 1.

27 Post-judgment interest is not allowed under applicable law until the judgment becomes final after  
28 review on appeal, and then only from the date of filing of the transcript of the Judgment with the Secretary

1 of the Treasury. *Romero v. United States*, 865 F. Supp. 585 (E.D. Mo. 1994).

2 **IT IS SO ORDERED.**

3 DATED this 23<sup>rd</sup> day of October, 2006.

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7 RONALD B. LEIGHTON  
8 UNITED STATES DISTRICT JUDGE  
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